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Wills -- Divorce -- Implied Revocation

The instant decision introduces a liberal concept into tax litigation which makes a marked inroad against the former inviolablity of the sovereign's tax power. Taxpayers may now require a standard of conduct from the government commensurate with that prevailing between man and man by invoking estoppel.

WILLS — DIVORCE — IMPLIED REVOCATION

A wife divorced her spouse and secured a property settlement. She took no steps to revoke an existing will and upon her death the ex-husband petitioned for his legacy under the will. *Held*, divorce by the testatrix does not impliedly revoke the will. *Ireland v. Terwilliger*, 54 So.2d 52 (Fla. 1951).

The English common law early recognized that certain changes in a testator's circumstances would raise the presumption of an intent to revoke an existing will. The English courts applied this presumption in cases of the subsequent marriage of a *femme sole*[1] and of the subsequent marriage of a man followed by birth of issue.[2] This was done even though such action seemed to fly in the face of the English Statute of Frauds[3] which said that no devise would be revocable except one revoked by a subsequent instrument or mutilated with *animus revocandi*. The death knell was sounded for the doctrine of implied revocation by change of circumstances in the English Wills Statute of 1837[4] which provided for revocation by subsequent marriage and explicitly prohibited other forms of revocation. Divorce, as it is known today, was not in the contemplation of the English courts of that time and there were no cases deciding the effect of divorce on an existing will.[5]

The doctrine of implied revocation of a will from a change in the testator's circumstances has been widely accepted in the United States.[6] Many states have embodied the common law concepts of it into statutes.[7] Some of these statutes state specifically what circumstances will effect the revocation,[8] while others provide for implied revocation by operation of law in addition to the prescribed methods of express revocation.[9] A large number

1. Hodsden v. Lloyd, 2 Bro. C.C. 534, 29 Eng. 293 (1789).
2. Marston v. Roe, 8 A. & E. 14, 112 Eng. Rep. 742 (Ex. Ch. 1838).
3. 29 CAR. II, c. 3, § 6.
4. 7 WM. IV & 1 VICT., c. 26, § 20.
5. 1 PAGE ON WILLS § 522 (3d ed. 1942); REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA (2d ed. 1946).
6. Gay v. Gay, 84 Ala. 38, 4 So. 42 (1888); Corker v. Corker, 87 Cal. 643, 25 Pac. 922 (1891); Herzog v. Trust Co. of Easton, 67 Fla. 54, 64 So. 426 (1914); Ellis v. Darden, 86 Ga. 368, 12 S.E. 652 (1890); Hudnall v. Ham, 183 Ill. 486, 56 N.E. 172 (1899); Nutt v. Norton, 142 Mass. 242, 7 N.E. 720 (1886); Wirth v. Wirth, 149 Mich. 687, 113 N.W. 306 (1907); *In re* Estate of O'Connor, 191 Minn. 34, 253 N.W. 18 (1934); Hilton v. Johnson, 194 Miss. 671, 12 So.2d 524 (1943); Hoitt v. Hoitt, 63 N.H. 475, 3 Atl. 604 (1885); Hale v. Hale, 90 Va. 728, 19 S.E. 739 (1894); *In re* Battis, 143 Wis. 234, 126 N.W. 9 (1910); in general, see Durfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406 (1942).
7. See Bordwell, *Statute Law of Wills*, 14 IOWA L. REV. 283, at 290-308 (1929).
8. *Id.* at 306.
9. *Ibid.*

of states have statutes that provide for revocation of a will insofar as it bestows any benefit on a divorced spouse.[10] Florida joined this last group in its 1951 legislative session.[11]

In those states not having express statutory provisions there is a wide split of authority as to the effect of divorce on an existing will.[12] The courts have almost uniformly held that divorce by itself is not sufficient basis for implied revocation.[13] This is based on the reasoning that a moral obligation exists on the part of the testator to share the property acquired during the marriage.[14] Even when divorce is accompanied by alimony there is no inference of implied revocation.[15] When the divorce decree includes a property settlement some courts take this as indicative of the intent of the parties that all matters of property shall be completely and finally settled. Therefore any legacy left the ex-spouse under the testator's will is revoked by operation of law.[16]

Prior to the instant case the effect of divorce, with or without a property settlement, had never been decided by the Florida Supreme Court. They had the opportunity in *Iles v. Iles*[17] but preferred to sidestep the issue and base their decision on the testator's intent as gleaned from interpretation of the will. The words, "to my wife, Pauline, should she survive me," were construed to mean only if she survived the testator as his wife. Since she was not his wife at the time of his death it was held that she was excluded from the will. However, the decision rendered there did hint that divorce standing alone would not revoke an existing will.

At one time Florida had a statute providing for express revocation of a will by certain means and it further provided that a will could be revoked "by act and operation of the law."[18] This last provision was omitted from the

10. ARK. STAT. ANN. tit. 60, § 407 (1951); KAN. GEN. STAT. ANN. § 59-610 Supp. 1947); KY. REV. STAT. § 392.090 (1946); MINN. STAT. ANN. § 525.191 (West 1945); PA. STAT. ANN. tit 20, § 180.7(2) (1947); WASH. REV. STAT. ANN. § 1398 (1931).

11. Fla. Laws 1951, c. 26914 (June 11, 1951).

12. See Evans, *Testamentary Revocation by Divorce*, 24 KY. L.J. 1 (1935).

13. Pacetti v. Rowlinski, 169 Ga. 602, 150 S.E. 910 (1929); Speroni v. Speroni, 406 Ill. 28, 92 N.E.2d 63 (1950); *In re* Brown's Estate, 139 Iowa 219, 117 N.W. 260 (1908); Donaldson v. Hall, 106 Minn. 502, 119 N.W. 219 (1909); Murphy v. Markis, 98 N.J. Eq. 153, 130 Atl. 840 (1925); Pardee v. Grubiss, 34 Ohio App. 474, 171 N.E. 375 (1929); *In re* Jones' Estate, 211 Pa. 364, 60 Atl. 915, (1905); *In re* Nenaber's Estate, 55 S.D. 257, 225 N.W. 719 (1929). *Contra: In re* McGraw's Estate, 228 Mich. 1, 199 N. W. 686, 1924), criticized in 21 ILL. L. REV. 282 (1926).

14. See *In re* Jones' Estate, *supra* note 12, 387, 60 Atl. at 923-24 (1905).

15. See *In re* Brown's Estate, *supra* note 12, 226, 117 N.W. at 263 (1908); *In re* Arnold's Estate, 60 Nev. 376, 381, 110 P.2d 204, 206 (1941).

16. Wirth v. Wirth, *supra* note 6; Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699 (1893); Donaldson v. Hall, *supra* note 12; *In re* Bartlett's Estate, 108 Neb. 681, 189 N.W. 390 (1922), noted in 21 MICH. L. REV. 375 (1923), 71 U. OF PA. L. REV. 192 (1923), 32 YALE L.J. 32 (1922); Matter of Gilmour's Estate, 146 Misc. 113, 260 N.Y.Supp. 761 (1932). *Contra:* Hertrais v. Moore, 325 Mass. 57, 88 N.E.2d (1949), noted 50 COL. L. REV. 531 (1950); Robertson v. Jones, 345 Mo. 828, 136 S.W.2d 278 (1940).

17. 158 Fla. 493, 29 So.2d 21 (1946), noted in 2 MIAMI L. Q. 57 (1947).

18. FLA. STAT. § 2273 (1906).

Probate Act of 1933,[19] although it did provide specifically for cases in which there was a marriage or marriage followed by issue.[20] The court interpreted this as indicative of legislative intent that no revocation should be found except as provided therein.[21] The new Florida statute[22] providing for revocation of an existing will by divorce was not controlling since it was enacted after the litigation in the instant case was commenced. The attorneys' briefs did not direct the court's attention to this statute and the opinion makes no mention of it. It may be that the court was unaware of its existence although it had been enacted over two months prior to the decision.[23]

Since the case was to be determined under the laws that then existed it is submitted that such law was not so clearly defined in Florida but that the court could have taken the view of its choice. Faced with a similar choice the New York Court of Appeals said: "The statute does not change retroactively a well established rule of law. It merely establishes a definite public policy in a field where the rules of law were still fluid and undefined. When the courts are called upon to define these rules even as an earlier date, they cannot entirely disregard public policy. The Legislature has made simpler the choice between possible rules even if it could not dictate such choice."[24] It is the writer's opinion that the Florida court would have done well to follow such a policy or failing in that, at least to have mentioned the new statute in passing.

19. Fla. Laws 1933, c. 16103.
20. FLA. STAT. § 731.14 (1949).
21. Ireland v. Terwilliger, 54 So.2d 52, 53 (Fla. 1951).
22. *Supra* note 11.
23. The decision in the noted case was made on August 21, 1951.
24. See Hutchinson v. Ross, 62 N.Y. 381, 187 N.E. 65, 71 (1933).